Minority Views on H.R. 2269,
The "Retirement Security Advice Act of 2001"

November 9, 2001

We support the effort of the majority to bring before this Committee the issue of improved access to investment advice for millions of American workers. We agree that, in light of the growth of self-directed pension plans, we must take steps to ensure that the 42 million workers who participate in, and are beneficiaries under, such plans have easy access to information designed to help them make better investment choices. However, we are disappointed that an issue of such importance was brought before the Committee in this manner.

The Committee on Education and the Workforce recognized the importance of this issue. Before marking up H.R. 2269 in full Committee, their Subcommittee on Employer-Employee Relations held five hearings between February 15, 2000, and August 2, 2001. On the other hand, this Committee did not hold one single hearing either in Subcommittee or full Committee. We lost a great opportunity to engage in dialogue with the proponents and opponents of this bill regarding the advantages and disadvantages of the approach adopted in H.R. 2269. We remain hopeful there will be an opportunity for us to come together and discuss all the issues, various available options, and agree on the best solution to this problem. This approach is necessary as millions of workers look to us to protect the security of their pension benefits.

While some of us are primarily concerned with only a single provision of the bill, collectively, there are many areas of concern that are addressed herein.

A fundamental premise of our pension law is that people who manage or administer assets of a pension plan cannot engage in any transaction under the plan in which they have a financial or other conflict of interest. These limitations are referred to as the prohibited transaction rules. There are limited statutory and regulatory exemptions from these rules, but only for cases that are determined to be in the best interest of plan participants and beneficiaries. When the prohibited transaction rules were enacted, there was considerable debate concerning whether such transactions should be subject to a complete bar, or if such transactions should be permitted if the plan received adequate compensation. The risks to the integrity of our pension system were considered to be too great if plan transactions involving a financial interest or other conflict were permitted. Thus, a complete bar was adopted.

The financial markets and financial transactions have become far more complicated since the prohibited transaction rules were enacted. In addition, the type of pension plan used by employers to deliver retirement benefits to their workers has changed. We recognize the need to respond to the changing market for pension plans, but we also value the importance of protecting the integrity of our pension system. Because of these tensions, we believe we would all be better served if we could come to the table and engage in a process that results in legislation that adequately addresses all the issues raised by these competing needs.

Some of our Members believe that no general exemption from the prohibited transaction rules should be permitted. They believe that such an approach has too great a potential for fraud and abuse. They argue that such a change would weaken or eliminate rules designed to prevent abuse of plan participants. Those of us who hold these views regard the disclosure provisions, minimum qualification requirements for advisors, and the availability of independent advice to plan participants when there is conflicted advice as an inadequate substitute for erosion of the protections American workers currently have under the prohibited transaction rules.

Another group of us believe that if certain safeguards are built into the system, an exemption to the prohibited transaction rules is permissible. The approach to ensure the existence of adequate safeguards varies according to the area of greatest concern for the Member. Some of us believe that if there is clear and meaningful disclosure, H.R. 2269 would be acceptable. Others are concerned with the qualification requirements for advisors as contained in the bill. Still others are concerned with the availability of independent advice to plan participants when there is conflicted advice. While some of us are concerned primarily with only a single provision, collectively, there are numerous areas of concerns. These are all addressed below.

1. *Disclosure*

We are pleased with the changes made to the underlying disclosure provision that were included in the Chairman's substitute to H.R. 2269 as introduced. We acknowledge that these changes will go a long way in providing information to plan participants as they struggle to make the best investments they can among the choice available to them. We hope these changes also are reflected in the provisions of the bill that fall under the Employee Retirement Income Security Act (ERISA) as it is brought to the floor.

Some of us would have preferred to improve a little further the standard adopted by the majority. We would have liked to provide the Department of Labor (DOL) regulatory authority under which it could provide a model disclosure form. This becomes important in light of the fact that the majority of the Committee on Education and the Workforce stated in its committee report views that it intends for the disclosure to be a flexible standard that each advisor would be able to interpret. We find this standard to be unacceptable. We do not believe that such an undeterminable standard was intended by the Members of this Committee. An Amendment that was proposed by Mr. Pomeroy and withdrawn would have ensured that disclosure under the bill followed a uniform standard. Adequate and meaningful disclosure to participants is very important. We believe that disclosure should be honest, straightforward, and uniform. In addition, it is important that disclosure made by electronic means be consistent with regulations issued by the DOL and the Treasury Department.

2. *Minimum qualification requirements for advisors*

Under H.R. 2269, a fiduciary advisor means a person who is a fiduciary of the plan by reason of providing investment advice to the plan, a participant, or beneficiary, and who is (1) registered as an investment advisor under the Investment Adviser Act of 1940, (2) a bank or similar financial institution, (3) an insurance company, (4) a registered broker or dealer under the Securities Act of 1934, (5) an affiliate of a person described above, or (6) an employee, agent or registered representative of a person described above who satisfies the requirements of applicable law relating to advice.

Those of us who have concerns regarding the qualification standard for investment advisors, as contained in the bill, believe this standard is inadequate for the following reasons. Banks and insurance companies would be permitted to be qualified advisors but are currently exempt from the Investment Advisers Act with respect to providing investment advice. Consequently, in States that do not have any qualification standards applicable to these entities, employees would be permitted to provide investment advice without demonstrating that they meet any level of proficiency in this area.

Because these entities are exempt under the Investment Advisers Act, there is no Federal level of regulation with respect to investment advice. Moreover, regulation at the state level is not uniform. While there are some states, such as California, that require an insurance agent to pass a written examination that is prepared and administered by the state; some states, such as Washington, allow anyone who meets the following requirements to be agents (1) be at least eighteen years of age, (2) be a resident of and actually reside in the state, and (3) be trustworthy and competent.

Further, the bill provides that an affiliate of a qualified entity would be a qualified investment advisor. An affiliate is broadly defined under the Investment Adviser Act to include all employees. Also, the bill specifically provides that an employee, agent, or registered representative of a qualified entity who satisfies the requirements of applicable law relating to advice would be a qualified agent under the law. This provides another opening for employees of banks and insurance companies to act as qualified investment advisors under the bill, without meeting any qualification requirements in some cases.

An amendment offered by Mr. Pomeroy and withdrawn would have ensured that all persons who give investment advice have a license under federal or state law or be registered with the Department of Labor. By doing so, the Pomeroy amendment would have provided an administrative remedy – i.e. the prospect of losing one's license – to ensure that advisers fulfill their fiduciary duties.

We believe it is imperative to ensure that only trained qualified persons provide investment advice to plan participants. The integrity of our pension system is too important. To permit a lesser standard here than we would in any other area involving investment advice would directly undermine the integrity of our pension system. We are hopeful that as the bill moves through the legislative process our negotiations in this area will bring us to an acceptable middle ground.

3. Availability of independent advice

With regard to the need to provide plan participant with independent advice, under the plan, when there is conflicted advice, some of us do not believe that the advisor who was selected by the employer to provide investment advice to the plan, participants and beneficiaries should be forced to share the contract with a competitor. Others among us believe that if we are permitting advisors to give conflicted advice to plan participants, we should ensure that they have the ability to receive non-conflicted advice. The latter group believes that if this option is not present, the claim that we are providing plan participants access to investment advice is nothing more than an empty promise.

Those of us who have concerns in this area do not believe that the only choice for plan participants should be to accept conflicted advice or go without any advice. Such a standard is not in the best interest of the plan participants or the beneficiaries. Yet, these are the very people proponents argue this bill is intended to help.

Some who oppose this modification have argued that advice is never truly free of conflict. We have a different view on this issue. Current law allows a plan sponsor to obtain investment advice from one of about twenty firms which provide this service, mainly through the internet. The fact that these independent firms do not sell their own products, nor do they earn differential fees for the investment options recommended provides an important element of protection against workers receiving conflicted advice.

The investment advice firms currently evaluate all the investment options under the plan. They then make recommendations to the plan participants based on the overall rating of the investment fund, and recommend the options they think are best. This has led some financial service firms to express dissatisfaction with some of these firms. In some cases, the financial service firm may conclude that the investment advice firm is not recommending a sufficient amount of their products or is not promoting the funds that generate the highest profits. While we understand and appreciate the frustration some of these financial service firms have experienced, we must be careful not to minimize the element of independence that is so vital to the integrity of our pension system.

Some of us have concerns in this area but would choose a different approach. Under this alternative approach, we would design a provision to ensure that there is a sufficient level of diversity among the investment options available under the plan. We believe such an approach would diminish the potential for abuse. To be successful with this approach, it would be necessary to preclude the plan from receiving conflicted advice. Thus, the exemption from the prohibited transaction rules would not apply to the plan, as currently permitted under H.R. 2269. Rather, the exemption would be limited to plan participants and beneficiaries under the plan, as was included in the Democratic Substitute that was offered by Rep. Robert Andrews in the markup held by the Committee on Education and the Workforce.

Such an approach would preclude a certain level of bias with respect to the investment funds offered by the plan. We believe that ensuring diversity among the products as well as among the different companies whose products are offered under the plan can go a long way to diminish the harm that could result with conflicted advice. This standard will ensure that more meaningful advice is received by plan participants.

4. Remedies available upon a breach of fiduciary duties

There are a few of us who believe steps must be taken to ensure that plan participants are empowered within a system that permits conflicted advice. One of the ways we believe this can be accomplished is by expanding available remedies in the case of a fiduciary breach.

The remedies available to plan participants under ERISA have not kept pace with the changing face of our pension system. ERISA was enacted at a time when pension plans were predominantly defined benefit plans. The remedies available under ERISA are designed to respond to a defined benefit plan structure. With the explosion of defined contribution plans and the creation of individual accounts under these plans it is now possible to measure the financial loss a plan participant has suffered as a result of a fiduciary breach. However, no modification of the current structure has been made.

Today, twenty five years after the enactment of ERISA, the courts remain unresolved as to what damages are permitted to the participant of a defined contribution plan who has suffered harm as a result of a fiduciary breach. The ERISA provision which gives an individual participant a cause of action (section 502(a)(3)) limits recovery to loss suffered by the plan.

This is a time when every effort should be made to enhance the right of recovery for plan participants. Yet, under the bill, only the current limited form of recovery would be continued. We do not believe that, given the significant changes being made to workers' protections provided under the prohibited transaction rules, the current form of remedies is adequate. We believe it is important to enhance the ability of injured participants to recover some of the economic loss suffered resulting from a breach of fiduciary duty.

In conclusion, we would again state that we agree there is a need to get improved access to investment advice to the millions of workers who participate in self-directed pension plans. We agree with the majority that this need must be addressed. However, in light of the comments expressed above, we believe that the approach taken under H.R. 2269 has some major problems that must be addressed if we are to move forward on this issue in a meaningful way. We hope that our majority will give us the opportunity to engage in discussion and design an approach to this need that responds to the many competing interests presented here.

Dissenting Views on H.R. 2269
The "Retirement Security Advice Act of 2001"

Charles B. Rangel	Sander Levin
Wm. J. Jefferson	Karen L. Thurman
Xavier Becerra	Robert T. Matsui
Jim McDermott	William J. Coyne
John Lewis	Jerry Kleczka
Pete Stark	Ben Cardin
Lloyd Doggett	Earl Pomeroy

Additional Views of Rep. Richard E. Neal
on H.R. 2269
The Retirement Security Advisors Act of 2001

As our pension system continues to move toward a system that favors defined contribution plans over defined benefit plans, the need for plan participants to have sophisticated investment advice to assist them to prepare for their retirement becomes increasingly imperative. H.R. 2269 as reported from the Education and Workforce Committee represents a reasonable, but flawed, attempt to fill this need.

Any break in ERISA's fiduciary rules gives rise to the concern that investment advice may be given without the sole interest of the individual plan participant in mind. Ensuring that this is not an unintended result constitutes an a priori condition for passage of any bill, and the proponents of this bill must demonstrate that they have done all they can to prevent such an occurrence. The Education and Workforce bill fails to accomplish this in two areas: adequate disclosure, and licensing.

The Substitute offered by Chairman Thomas adequately addresses the former problem. The Substitute imposes additional disclosure requirements on investment advisors that improve the information disclosed to participants as they consider investment options that have an element of self-interest for the advisor. While additional protections might be helpful, such as requiring disclosure each time the advice is given and requiring that employers provide independent advisors when it is requested by a plan participant, the disclosure standards in the Chairman's mark meets the minimum acceptable level.

Unfortunately, this is not true of the standard governing qualification of investment advisors. As reported by both the Education and Workforce Committee and the Committee on Ways and Means, some individuals with no special training or qualification could provide investment advice to plan participants because certain financial institutions are exempt from the Investors Advisers Act as it pertains to investment advice, and not all States have filled in this gap. In addition, the statutory definition of "affiliate" in the Investment Advisers Act is so broad that any employee could give the advice. This standard provides an incentive for advice to be offered by less qualified individuals, which would be less expensive for the companies providing the service.

This problem could have been solved by an amendment offered but withdrawn by a Democratic Member, Mr. Pomeroy of North Dakota. His amendment would have required an employer to provide an advisor who is licensed under state or federal law. However, employees of bank trust departments – a common source for investment advisors – are not subject to licensure requirements. Apparently, some believe it would be too great a burden to require their employees to meet minimum licensing requirements that would be prescribed by the Secretary of Labor.

I supported final passage of the Ways and Means Committee version of H.R. 2269. I strongly hope that Mr. Pomeroy will be able to work out an agreement with the Chairman of the

Committee for stronger licensing agreements. I also hope that the disclosure standards adopted in the Chairman's substitute will be reflected in the ERISA provisions of the bill when H.R. 2269 is brought to the House floor. Should disclosure standards be weakened, or licensing standards not be added, I reserve the right discontinue by support.